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No. 81-2210

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

GREYHOUND LINES, INC.,
Petitioner,

v.

RICHARD PRICE,
Respondent.

BRIEF OF PETITIONER, GREYHOUND LINES, IN REPLY TO BRIEF OF RESPONDENT

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1. Respondent, Price, does not dispute Petitioner's Statement of the Case, and specifically admits therein, on page 7 of his brief, that the lower court did not rule upon Greyhound's Motion to Transfer when granting the Motion to Dismiss. Respondent, however, in his argument on page 10, states that the Fourth Circuit "dismissed" Petitioner's Motion to Transfer, thereby contradicting his own Statement of the Case. There can be no question in this record that the lower court never ruled on Petitioner's Motion to Transfer, neither in its Order dismissing the case (App. 2a), nor in its denial thereafter of Petitioner's Motion for Rehearing or Suggestion for Rehearing *En Banc.* (App. 1a).

2. Respondent, in his brief, does not explicitly answer Petitioner's argument that 33 U.S.C. 921(c) could be

interpreted as a venue statute, but simply relies, in support of his position, on the First Circuit opinion of *Dantes* v. *Western Foundation Associates*, 614 F.2d 299 (1st Cir. 1980) which held the statute jurisdictional.

3. Respondent does not dispute the existence of a conflict in the Circuits between the Ninth Circuit's opinion in *Pearce* v. *Director, OWCP*, 603 F.2d 763 (1979), and the First Circuit's opinion in *Dantes* v. *Western Foundation Associates*, 614 F.2d 299 (1980). However, for failure of the Fourth Circuit to rule upon, or even comment upon the question of transfer, the lower court opinion herein is devoid of any evidence of consideration of transfer by the Fourth Circuit, or explicit reliance upon *Dantes*, *supra*, or rejection of *Pearce*, *supra*, as authority for its dismissal.

4. Respondent's brief does not answer the question of whether 33 U.S.C. 921(c) confers "exclusive" subject-matter jurisdiction upon the circuit "in which the injury occurred." Respondent's attempt, on page 12, to distinguish various cases relied upon by Petitioner in its brief, confuses the authority relied upon by Petitioner to support its argument that lacking statutory authority, an appellant court has an "inherent" power to transfer a pending case to another circuit for disposition on the merits, with conflicting cases under this statute and other Federal law. Respondent does not dispute Petitioner's argument that this Court has never ruled on the question of appellate transfer between circuits, or whether timely-filed petitions for review under 33 U.S.C. 921(c), which have been filed in the "wrong circuit", should be transferred.

5. After the filing of this Petition, both counsel for Petitioner and counsel for Respondent were contacted by a representative of the Solicitor General's office request-

ing comment on the applicability of newly-enacted legislation requiring appellate transfer, where a court has found that there is lack of jurisdiction. This legislation was enacted on April 2, 1982, and published in *U.S. Law Week* on April 27, 1982. The statute is found in the Federal Courts' Improvement Act, Public Law No. 97-164, Sec. 1321, 96 Stat. 25, 55 (1982), and provides as follows:

> Sec. 1631. *Transfer to Cure Want of Jurisdiction.*
>
> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court *shall*, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred. (Emphasis added.)

When the lower court dismissed Petitioner's Petition for Review herein, the court specifically found that it lacked subject-matter jurisdiction. (App. 2a) The statute cited above was enacted by Congress specifically to cover the situation which exists in the present case, where a court finds no subject-matter jurisdiction and, by refusal to transfer, leaves Petitioner outside of the time limits for filing a second petition for review in another circuit. In the legislative history, preceding enactment, the Senate Committee considering the bill, stated as follows:

> *Transfer of Cases:*
>
> Sec. 301 - Because of the complexity of the Federal Court system and of special jurisdictional provisions, a civil case may on occasion be mistakenly filed in a

> court—either trial or appellate—that does not have jurisdiction. By the time the error is discovered, the statute of limitations or a filing period may have expired . . .
>
> Sec. 301 adds a new chapter to Title 28 that would authorize the court in which a case is improperly filed to transfer it to a court where subject-matter jurisdiction is proper. The case would be treated by the transferee court as though it had been initially filed there on the date on which it was filed in the transferor court . . . This provision is broadly drafted to allow transfer between any two Federal courts. Although most problems of misfiling have occurred in the district and circuit court, others have occurred in the Court of International Trade and the Temporary Emergency Court of Appeals. Some others may occur in the court of appeals for the federal circuit. The broadly drafted provisions of Sec. 301 will help avoid all of these situations. S.Rep. No. 275, 97th Cong. 1st Sess. 30 (1982).

Congress also noted, in that same committee report, that a "litigant may find himself without a remedy because of a lawyer's error or technicality of procedure." S.Rep. 275, 97th Cong. 1st Sess. 11 (1982).

Both Petitioner and Respondent are in agreement that the aforementioned legislation, which becomes effective on October 1, 1982, will ensure uniformity among the circuits and provides statutory authority for transfer where there is lack of subject-matter jurisdiction. (Respondent's Brief, p. 14.) The Respondent, however, asserts that this new legislation does not affect the case at bar. Petitioner strongly disagrees with his view, and asserts that this case will be pending on October 1, 1982 when this legislation goes into effect, and that this legislation should govern disposition of this case by this Court, and granting of the relief requested by Petitioner. Such

issue, in fact, has previously been decided, favorable to the Petitioner, by this Court in *Ex Parte Joseph Collett*, Petitioner, 337 U.S. 55 (1949), involving the effect of the enactment of Title 28, Sec. 1404(a), which is also a transfer statute. In that action, petitioner had argued that the pending case should not be transferred because it was instituted prior to the effective date of that code provision. This Court rejected that argument, and stated as follows:

> Clearly, Sec. 1404(a) is a remedial provision applicable to pending actions. And "no one has a vested right in any given mode of procedure . . ." *Crane* v. *Hahjo*, 258 U.S. 142, 147, 66 L.Ed.2d 514, 517, 42 S.Ct. 214 (1922).

337 U.S. at 71

Petitioner asserts, therefore, that the Federal Courts' Improvement Act of 1981 and specifically the new transfer statute, 28 U.S.C. 1631, is, like its predecessor in time, 28 U.S.C. 1404(a), a remedial statute and procedural, and therefore, should be given effect in the pending case herein. In such situations, where a petition before this Court is affected by newly-passed legislation, this Court has not in the past hesistated to grant certiorari and vacate the judgment of the lower court, and to remand the case to the federal circuit for further consideration in light of newly-enacted legislation. *Jenkins* v. *Brewer*, 450 U.S. 904, 101 S.Ct. 1338, 67 L.Ed.2d 327 (1981); *Allen* v. *Ellisor*, ___ U.S. ___, 102 S.Ct. 80, 70 L.Ed.2d 76 (1981); *Bureau of Economic Analysis* v. *Long*, ___ U.S. ___, 102 S.Ct. 468, 70 L.Ed.2d 242 (1981).

What has now been expressed as the intent of Congress, in its enactment of 28 U.S.C. 1631 (1982), was also the intent of the Ninth Circuit when it granted transfer to

the petitioner in *Pearce* v. *Director, OWCP*, 603 F.2d 763 (1979). As the Court, in *Pearce*, stated:

> Transfer keeps this case alive and that is what ought to happen.

Furthermore, the enactment of this legislation specifically overrules the views of the First Circuit in *Dantes, supra*, and the position taken by the Respondent and Director, OWCP, before the court below regarding transfer, and transfer to the Third Circuit, rather than dismissal, is the proper remedy for the Petitioner herein.

CONCLUSION

Petitioner respectfully asks this Court to grant certiorari, to vacate the judgment of the Fourth Circuit, and to remand this case for further consideration, in light of Public Law 97-164, Sec. 1631, 96 Stat. 25, 55 (1982), and to direct the Fourth Circuit to transfer this Petition for Review to the Third Circuit, as requested herein.

Respectfully submitted,

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